# Instructions and Information for Settlement Conferences

This document explains the settlement conference process as I conduct it. It also includes my expectations of the lawyers and parties in preparing for the settlement conference. Please read these instructions carefully.

## Expectations

Each of the following expectations is the product of hard experience as a settlement conference judge. Each also is a precondition to my agreement to mediate your case. Meeting these expectations will ensure that the time spent preparing for and conducting the settlement conference is time well-spent and, ultimately, time that produces an acceptable outcome from your settlement conference.

I. Attendees.

A. Each party must have physically present at the settlement conference the representative who is the decision-maker with respect to the amount of money to be offered or agreed to in settlement. "Decision-maker" means the person who possesses full and final authority to settle the case without need to contact or confer with a person not present at the settlement conference. If a party has multiple decision-makers, they must either be present as well or have given the decision-maker in attendance unrestricted authority to settle the case.

B. Geographic distance from Portland is not a reason or excuse to avoid the decision-maker's in-person attendance. If participating in a judicial settlement conference to attempt settlement is important to your client or your client representative, then being here in-person to reach that goal should be equally important, especially if your client is the party who requested the settlement conference. Bear in mind that in-person attendance also is respectful of the other parties who are personally present.

C. The trial attorney and, if applicable, the settlement attorney for each party must attend the settlement conference in person. If a party's trial attorney is from outside Oregon, then that attorney and that party's Oregon counsel must be physically present at the settlement conference.

D. Identify by name and title the attendees to the settlement conference.

II. Position Statement.

Any settlement conference statement that does not comply with the following requirements will be returned to the party who submitted it, for revision and re-submission:

**A. Limit the statement to eight (8) pages.** Eight pages means eight pages.

**B. Do NOT submit a position statement that reads like a summary judgment brief.** Do not try to convince me that you certainly will obtain or thwart summary judgment, or that you are certain to prevail at trial. If you or your client are that confident about your case, then a settlement conference is a waste of everyone's time. Go to trial instead.

**C. Be candid.** Candor is key to your credibility with me and to my ability to effectively mediate your case. No purpose is served by praising your strengths and admitting no weaknesses, or of discussing only the myriad shortcomings of the opponent's case. If your case is that good, then – again – go to trial. Any unfavorable aspect of your case that you choose not to share with me almost always appears in the other side's position statement, so you'll lose credibility with me before the settlement conference even begins.

**D. Be timely.** Please send me your position statement five (5) business days in advance of the date the settlement conference will occur. Late statements reduce my ability to be fully prepared for the conference. **To facilitate timely submission of your statement, you may e-mail it directly to me at John_Acosta@ord.uscourts.gov. If you e-mail your statement DO NOT also send me a copy by mail, and vice versa.**

**E. Your position statement must address these points:**

1. The three (3) best and three worst facts for your case.
2. Any legal issues which, when ruled upon, could substantially change your client's position in the case, either favorably or unfavorably.
3. An explanation of any factors making settlement difficult for the parties.
4. Any common goals that might facilitate settlement.
5. The status of settlement negotiations, including the last settlement proposal made by each party. If the parties have settled some part of the case already, please tell me that and identify the issue or issues that have been settled.
6. The fees and costs you have incurred to date, and an estimate of the anticipated fees and costs you will incur to prepare, try, and participate in an appeal of the case.
7. The range – reasonable and realistic – you currently consider reasonable for settling the case. **Note:** this is not an invitation to tell me your "bottom line" number, which I do not want to know, at least not at the outset of the settlement discussions.

You may attach key exhibits, reasonable in number and length, such as documents constituting the alleged contract, letters or e-mails that contain an alleged admissions, and similar documents, if the exhibits are critical to understanding the case or the parties' respective positions.

III. Settlement Authority.

The party who is in the position of being the paying party (usually the defendant or defendants) must come to the settlement conference with enough authority to settle the case. Opinions will vary on what amount of money constitutes "enough." I appreciate that the parties disagree on the settlement value of the case and that they asked for a settlement conference at least in part for that reason. However, the paying party's representative should not attend the settlement conference if s/he has been told by someone else not attending the settlement conference that s/he must get a settlement for "X" because the paying party won't agree to settle the case for more than that, no matter what. Such a position does not allow for changes in the negotiating position when new information or new perspectives are revealed or discussed during the settlement conference.

IV. Preparation.

Participants should be prepared in advance of the settlement conference in each of the following areas:

**A. Know whose turn it is to make the next number.** On a number of occasions – even after the lawyers have been given these settlement conference instructions – the lawyers arrive at the settlement conference and disagree which party is to make the next settlement number. **The parties should arrive the at settlement conference having talked about this and being in agreement about which of them is to make the next settlement number.**

**B. Don't show up at the settlement conference with a new settlement position.** At the settlement conference, the plaintiff should not give me a higher number and the defendant should not give me a lower number than had been discussed between the parties in any settlement discussions prior to the settlement conference. Such changes negatively affect the entire process and impair my ability to move the parties toward a settlement. If you or your client must change a prior position, convey it to the other side as soon as possible before the settlement conference.

**C. Agree on the range of economic damages at issue before you arrive.** Parties frequently arrive at settlement conference with greatly contrasting assumptions and calculations about the economic damages, past and future, at issue in the case. There often is disagreement over even the most basic and easily determined facts such as rate of hourly or annual pay, the kind and value of benefits, and the amount of mitigation. This disagreement delays the settlement conference and subtracts from the time available to work through more difficult issues relevant to settlement.

**D. Exchange material terms of settlement before you arrive.** Almost always, a case settles because one side agrees to pay an amount of money that the other side agrees to

accept. Almost always, agreement upon the amount is the culmination of the settlement conference – unless one side then discloses, for the first time, a term or condition that is essential to their willingness to settle. Such surprises are disruptive to the process and even can derail an agreement. Exchange written settlement terms in advance of the settlement conference so that everyone understands what settlement will mean or so we can resolve disagreements over proposed terms during the settlement discussion.

**E. Come prepared to give up stuff.** Settlement is a compromise, not a capitulation. Don't show up expecting the other side to give you everything you want or that I will be able to convince them to do so. If the case is to settle, one side will have to pay more than it hoped to pay and the other side will have to accept less than it hoped to get.

**F. Expect that at some point during the process you will be outside your predetermined comfort zone.** It is counter-productive and ultimately unrealistic to come into a settlement conference having already decided that you will not take less than a certain amount or not pay more than a certain amount. Almost always, parties who begin with that mind-set change their minds during the process. Keep an open mind and allow for the likelihood that you will hear information, arguments, and perspectives you hadn't considered previously.

**G. Make meaningful and good-faith offers and counter-offers.** Yes, it's scary to be the first one to make a "big" move. But, somebody has to do it first so it might as well be you. How does this help your settlement posture? Once you do, you give me the leverage to convince the other side to make a similarly meaningful move and you make it more difficult for the other side to justify incremental increases or decreases in its numbers. Plus, it moves the process toward final resolution more quickly and effectively.

**H. Be reasonable.** Really.

**IF ANY PARTY TO A PROPOSED SETTLEMENT CONFERENCE IS UNABLE TO MEET ANY OF THESE EXPECTATIONS, I WILL DECLINE TO CONDUCT YOUR SETTLEMENT CONFERENCE.**

## Voluntariness

This is a voluntary process. Unless the assigned judge has ordered the parties to participate in a settlement conference, the parties' participation is voluntarily and any party may elect at any time to discontinue its participation in a settlement conference. In other words, you can quit when you want and I won't make you stay. Also, I will not exercise any authority as a judge to order or require any party to make an offer, accept an offer, or settle the case. If the case settles, it will be because the parties willingly decide to settle it.

## Good Faith

I expect that parties who voluntarily agree to participate in a settlement conference do so with the intent of participating in good faith and with a genuine interest in reaching a settlement agreement. Don't request or participate in a settlement conference simply to make a record which you will use later in the case for some other purpose. I will devote the time reasonably necessary to assist the parties in reaching settlement and expect all participants to do the same until we either settlement the case or conclude that settlement is not possible.

## Confidentiality

This is a confidential process. That means three things. First, I will not disclose discussions with one party to another party without the consent of the disclosing party. Note, however, that I will advise each party generally how I perceive the other parties to be responding to the process and whether I believe progress is being made. Confidentiality survives the settlement conference whether or not the case is settled, and it continues to apply to any settlement discussions, written or oral, in which the I am involved after the conference.

Second, communications exchanged between the parties and me or between the parties during the conference are considered not admissible as evidence in the pending case, should settlement not occur. Likely, such communications, as well as communications between a party and its attorney regarding mediation and settlement, are not admissible in any other judicial proceeding as well. On these points, at least one judge in this district has so ruled. *See Fehr v. Kennedy, et al.*, No. 08-1102-KI, 2009 WL 2244193 (D. Or. July 24, 2009). However, cases from other jurisdictions are not in complete agreement on this issue, so the parties should be aware that a trial court or appellate court might rule that disclosure of such communications must or may be made in a later dispute, whether regarding settlement of the case or some other matter.

In any event, documents and facts disclosed by the parties during discovery or in other case proceedings that are subsequently used or referred to during the settlement conference are not confidential simply because they are used or referred to during the settlement conference. In other words, discoverable information cannot be protected by using it or referring to it during a settlement conference.

Third, if the case does not settle, I will not disclose to the assigned judge anything other than the fact that the case did not settle. Opinions and observations I might have about the parties' positions, arguments, offers and counteroffers, as well as the discussions I have with the parties, are not shared with the assigned judge.

## Agreement to Mediate

An agreement to mediate is attached with these instructions. It covers confidentiality as well as other points to which the parties and their counsel will be asked to agree. Please review it

and come to the settlement conference with a signed copy or be prepared to sign a copy of the agreement to mediate.

## Caucuses

During the settlement conference I will meet individually with each party and the party's attorney, and more than once. These individual caucuses are intended to allow the parties and their attorneys to speak privately and candidly with me about the case and about options for reaching settlement. These individual caucuses will vary in length, depending on the complexity of the case and the settlement negotiations. There will be times when I am in the other party's room for extended periods of time. During such periods your patience is appreciated.

## Conclusion of the Settlement Conference

The settlement conference likely will result in one of three possible outcomes: settlement, no settlement, or continuation of settlement discussions beyond the day of the settlement conference. If the settlement conference results in an agreement to settle the case, I might ask the parties and their attorneys to sign a document that contains the essential terms of the parties' agreement before they leave the courthouse. It helps if one side brings a draft agreement for that purpose. However, in some cases a written agreement will be signed later because of agreed-upon contingencies that must be satisfied. In those cases, I might ask the parties to sign a memorandum of understanding that states they have agreed in principle to settle the case, states the terms of the understanding, and makes clear that there is no agreement until the contingencies have occurred or been satisfied and a final agreement has been signed.

## Post-Conference Procedure

If the parties reach a settlement, I will report the case as "settled" to the assigned judge. Each judge proceeds differently, but you should expect the assigned judge to issue a dismissal order upon receipt of my report that the case is settled. Usually, a judge will vacate a dismissal order if the settlement is not consummated (e.g., the paying party fails to pay), but another possibility is that the judge will leave the order in place and the aggrieved party will be required to pursue a breach of contract claim.

If the parties wish, I will consider retaining jurisdiction over the settlement for purposes of resolving any disagreements about the settlement terms to which the parties agreed. I retain materials received or created in connection with the settlement discussions for a reasonable period of time following the settlement conference, in case I need to assist further settlement discussions, oversee implementation of the settlement agreement, or resolve any disputes arising out of the settlement agreement.